ORIGINAL

BEFORE THE ARIZONA CORPORATION COMMISSION

RECEIVED

2004 DEC 22 A 11:43

AZ CORP COMMISSION
DOCUMENT CONTROL

Arizona Corporation Commission
DOCKETED

DEC 22 2004

DOCKETED BY

Commissioners
Marc Spitzer - Chairman
William A. Mundell
Jeff Hatch-Miller
Mike Gleason
Kristin K. Mayes

IN THE MATTER OF THE DISSEMINATION OF INDIVIDUAL CUSTOMER PROPRIETARY NETWORK INFORMATION BY TELECOMMUNICATIONS CARRIERS	))))))	**Docket No. RT-00000J-02-0066**

COMMENTS OF SPRINT COMMUNICTIONS COMPANY L.P.

I. Introduction

Sprint Communications Company L.P. ("Sprint") submits these comments in response to the Arizona Corporation Commission's ("Commission") October 28, 2004 Procedural Order in the above-captioned matter regarding the adoption of proposed rules to govern the handling of customer proprietary network information ("CPNI") by telecommunications carriers. In addition to these comments, Sprint concurs in the comments filed by the Arizona Wireless Group, of which Sprint Spectrum L.P., Sprint's wireless affiliate, is a participating member to be filed in response to the Procedural Order. Sprint also incorporates by this reference its previous comments; in particular those filed May 17, 2004, into its submission to the Commission today.

II. The Commission's Proposed Rules are Legally Insufficient

Sprint has always recognized, supported, and made every effort to protect the privacy of its customers, especially the information designated as CPNI by the FCC. Since the inception of the FCC's rules governing the handling of CPNI, Sprint strives to remain in compliance with their provisions, and is unaware of any complaint against it at either the federal or state level for mishandling customers' CPNI. Additionally, as the Commission is aware, the U.S. Court of Appeals for the Tenth Circuit in *US West v. FCC*, 182 F.3d 1224 910th Cir. 1999), cert. denied 530 U.S. 1213 (2000) relying on *Central Hudson Gas & Elec. Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557 (1980) articulated a constitutional framework that protects customers' privacy that is currently reflected in the FCC's rules:

> [T]he government may restrict the speech only if it proves: "(1) it has a substantial state interest in regulating the speech, (2) the regulation directly and materially advances that interest, and (3) the regulation is no more extensive than necessary to serve the interest."[1]

It is these same standards as articulated in *US West v. FCC* and reinforced by *Verizon Northwest, Inc. v. Washington Utilities and Transportation Commission*, 282 F.Supp.2d 1187 (Aug. 25, 2004) that the Commission's proposed rules violate. In particular, Sprint notes that the Commission has proceeded to propose rules that deviate substantially from the constitutional example established by the FCC's rules without articulating any specifically defined or articulated interest in protecting Arizona consumers' privacy beyond the protections already in place at the federal level. As noted by the *US West* Court:

---

[1] *US West v. FCC* at 1233 citing *Revo v. Disciplinary Bd of the Sup. Ct. for the State of N.M.*, 106 F.3d 929, 932-33 (10th Cir.) citing *Central Hudson*.

> Although we agree that privacy may rise to the level of a substantial state interest, the government cannot satisfy the second prong of the Central Hudson test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served. Moreover, privacy is not an absolute good because it imposes real costs on society. Therefore, the specific privacy interest must be substantial, demonstrating that the state has considered the proper balancing of the benefits and harms of privacy. In sum, privacy may only constitute a substantial state interest if the government specifically articulates and properly justifies it.[2]

Although Sprint recognizes the Commission's authority to adopt its own rules, it nonetheless must point out that any such rules may note deviate from the constitutional standards set forth above which the existing proposed rules do not. As a result, the proposed rules will not withstand judicial scrutiny on appeal.

After evaluating the Commission's revised draft, which Sprint finds better than the previously circulated versions, but still insufficient to warrant support, Sprint's conclusion remains that the proposed rules still perpetuate flawed legal reasoning that result in unworkable and vague rules that constitute an unnecessary overlay to the FCC's rules. Not only has the state failed to adequately articulate its interest in privacy, as discussed further below, but the Arizona Rules attempt to impose upon carriers some of the same restrictions the *US West* Court held unconstitutional. Sprint urges the Commission to reconsider the current draft of its proposed rules and adopt a version that more fully embraces the constitutional standards expressed in *US West*, and in particular the *Central Hudson* test.

III. State-specific CPNI rules are unnecessary and unjustified.

Despite having conducted workshops, discovery, and even public hearings regarding the need for CPNI rules, the record in this matter still does not justify the

[2] *Id.* at 1235-36.

proposed rules. This failure is due in part to the simple fact that the rules protecting CPNI that the FCC adopted have adequately served to protect consumers' privacy. In the entire time this record has been open, the Staff has failed to provide one instance where a customer has expressed dissatisfaction with the ways a carrier has handled his or her CPNI. To Sprint's knowledge, not one of its customers has complained about the privacy protections that FCC rules afford him or her – whether to the ACC, the Attorney General or the FCC. As a result, the record before the Commission in this matter utterly fails to support rules more burdensome (and therefore constitutionally suspect) than the FCC's and are therefore inadequate to protect either the carriers' First Amendment rights or Arizona consumer's privacy. It is clear that the proposed rules will not address an existing problem, and will serve no compelling state interest and therefore should be either modified to reflect the FCC's rules or abandoned altogether.

IV. The ACC's proposed rules contain severe legal flaws and should not be adopted.

Although Sprint asserts that the Commission's CPNI rules suffer the fatal flaw of having neither legal nor factual support, several rules represent particularly troublesome examples of why such rules are unworkable. For example, R14-2-2103 nominally allows carriers to utilize an opt-out approach to gain customers' consent to use their CPNI. Yet this rule requires carriers to meet burdensome and costly requirements in fulfilling the notice obligations, such as font size and separate mailings requirements (these requirements are included in R14-2-2105). Requirements such as a 12-point font size and a separate mailing requirement will not only cost carriers millions to implement, but will possibly serve to confuse customers. In any event, less burdensome alternatives exist, such as bill inserts that conspicuously call the customers attention to the CPNI notice. To

the extent the Commission remains concerned that customers do not look at bill inserts, Sprint submits that the Commission could initiate a campaign to call customers attention to the customer notices that are included with their bills as inserts.

Another problem that permeates the R14-2-2103 is the requirement for carriers to "'execute a proprietary agreement' in accordance with 47 C.F.R. §64.2007(b)(2) ... with all affiliates, joint venture partners and independent contractors[.]" While Sprint welcomes a proposal to incorporate the FCC's rules in Arizona, the application of this rule in R14-2-2103 leaves several questions unanswered and will likely lead to confusion among carriers as to how to comply with it. For example, the FCC's "total service approach" does not require a proprietary agreement as described in 47 C.F.R. §64.2007(b)(2) between affiliates that provide telecommunications services, so the proposed rule requires compliance with an FCC rule in a manner inconsistent with its intended application.

Most troubling for Sprint, however, remains the requirement that all opt-out consent be verified within 180 days. The Commission's proposed rule R14-2-2108 directly and impermissibly restricts carriers' free speech rights by requiring a follow-up interaction with the customer to ensure that their consent obtained through the "opt-out" process was indeed intentional. This verification requirement completely eviscerates any benefit offered by the ability of carriers to gain customers consent to use CPNI through the opt-out process and runs afoul of the constitutional strictures enumerated in *Central Hudson* that impositions on commercial free speech must be narrowly tailored. Further, the Commission has never demonstrated either at the workshop or in any of the multiple opportunities Staff has had to make the argument, that verifying a customer's decision to

consent to the carrier's use of his or her CPNI through the opt-out process materially advances any substantial state interest – or that the proposed regulation is drawn as narrowly as possible given the circumstances.

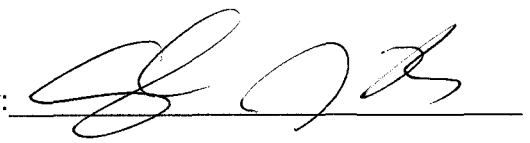
Sprint notes that the 180-day verification requirement appears to be an effort to either compromise in the face of the clear legal rights of carriers or otherwise mitigate what is, even with a six-month window, an impermissible restriction of free speech. The Commission Staff seems to assume that this 180-day window is sufficient time for carriers to utilize a customer's CPNI before requiring a follow-up verification without recognizing that the verification requirement itself, let alone the significant costs in implementing such a requirement, is the problem.

V. Conclusion

With the lack of consumer complaints on this subject in the record, or other evidence that companies' handling of CPNI compromises the privacy of their customers for that matter, verification is duplicative and unnecessary, and completely unsupported. Further, when approached by a carrier trying to verify a customer's opt-out consent, customers may become confused as to their initial choice in the matter, resulting in subsequent calls to the carrier or even the Commission to sort the matter out. Sprint urges the Commission to change the rules attached to the October 28, 2004 Procedural Order to reflect the constitutional requirements articulated in *U.S. West* and *Verizon Northwest.*

Dated this 22nd day of December 2005.

Respectfully submitted,
SPRINT COMMUNICATIONS COMPANY L.P.

By: 

Steven J. Duffy
Isaacson & Duffy P.C.
3101 N. Central Ave., Suite 740
Phoenix, AZ 85012-2638

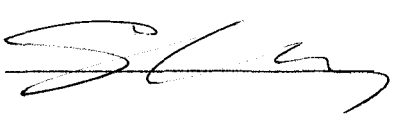
Eric S. Heath – Attorney
Sprint Law and External Affairs Dept.
100 Spear Street, Suite 930
San Francisco, CA 94105-3114

Original and 13 copies
Filed December 22, 2004 with:

Docket Control
Arizona Corporation Commission
1200 West Washington St
Phoenix AZ 85007

And a copy mailed December 22, 2004 to:

See Service List



SERVICE LIST FOR
DOCKET NO. RT-00000J-02-0066

Ernest G. Johnson
Director, Utilities Division
Arizona Corporation Commission
1200 W Washington St
Phoenix AZ 85007

Maureen A. Scott
Gary H. Horton
Legal Division
1200 West Washington St
Phoenix AZ 85007

Lyn Farmer
Arizona Corporation Commission
1200 W Washington St
Phoenix AZ 85007

Christopher Kempley
Arizona Corporation Commission
1200 W Washington St
Phoenix AZ 85007

Timothy Berg
Theresa Dwyer
Fennemore Craig
3003 N Central Ave, Suite 2600
Phoenix AZ 85012-2913

Curt Hutsell
Citizens Communications
4 Triad Center, Suite 200
Salt Lake City UT 84180

Michael W. Patten
Roshka Heyman & DeWulf PLC
One Arizona Center
400 E. Van Buren St, Suite 800
Phoenix AZ 85004

Deborah R. Scott
Citizens Communications Co.
2901 N Central Avenue, Suite 1660
Phoenix AZ 85012

Thomas Campbell
Michael Hallam
Lewis & Roca
40 N Central Avenue
Phoenix AZ 85004-4429

Thomas Dixon
Worldcom, Inc.
707 17th St, Suite 2900
Denver CO 80404

Teresa Tan
WorldCom Inc.
Department 9976
201 Spear Street, Floor 9
San Francisco CA 94105

Jon Poston
ACTS
6733 E. Dale Lane
Cave Creek AZ 85331

Scott Wakefield
Daniel Pozefsky
RUCO
1110 W Washington St., Suite 200
Phoenix AZ 85007

Mark Brown
Maureen Arnold
Qwest Communications, Inc.
3033 N Third Street, Room 1001
Phoenix AZ 85012

Joan S. Burke
Osborn & Maledon
2929 N Central Avenue, Floor 21
Phoenix AZ 85012-2794

Robert E. Kelly
Allegiance Telecom of Arizona, Inc.
1919 M Street, NW, Suite 420
Washington DC 20036

Bradley Carroll
Cox Arizona Telcom, LLC
1550 W Deer Valley Rd
Phoenix AZ 85027

Jeffrey W. Crockett
Snell & Wilmer
One Arizona Center
Phoenix AZ 85004-2202

Gregory Kopta
Davis Wright Tremaine
2600 Century Square
1501 N Fourth Avenue
Seattle WA 98101-1688